STATE OF MICHIGAN

IN THE SUPREME COURT

QUALITY PRODUCTS AND CONCEPTS COMPANY,

Plaintiff-Appellee,

v.

NAGEL PRECISION, INC.

Defendant-Appellant.

Supreme Court No. 119219

Court of Appeals No. 207538

Wayne County Circuit Court
No. 96-612160-CK

DEFENDANT-APPELLANT NAGEL PRECISION, INC.'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT DEFENDANT'S SILENCE IN THE FACE OF PLAINTIFF'S EFFORTS TO PROCURE SALES TO MACHINE TOOL SUPPLIERS WAS SUFFICIENT TO RAISE A GENUINE ISSUE OF FACT ON THE QUESTION OF WHETHER THE PARTIES' CONTRACT WAS MODIFIED TO INCLUDE SALES TO MACHINE TOOL SUPPLIERS, WHERE THE PARTIES' CONTRACT INCLUDED A WRITTEN-MODIFICATION REQUIREMENT AND AN ANTI-WAIVER PROVISION?

Defendant-Appellant Nagel Precision answers, "Yes."

Plaintiff-Appellee QPAC answers, "No."

The Court of Appeals would answer, "No."

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

I. Nature of the Case

This is an action involving a former sales representative's claim for unpaid commissions on sales excluded from the representative's territory under the parties' written agreement. The defendant filed a motion for summary disposition, relying on the terms of the written agreement. In response, the plaintiff argued that it was entitled to the commissions under various equitable doctrines, including waiver and contract implied in law. On September 30, 1997, the lower court granted Defendant's motion for summary disposition.

On March 21, 2000, the Court of Appeals reversed the lower court's decision. The Court of Appeals held that there were questions of fact for the jury to decide regarding both of plaintiff's theories. On December 15, 2000, this Court vacated that portion of the Court of Appeals Opinion that addressed plaintiff's contract implied in law theory, and remanded the case to the Court of Appeals for reconsideration of whether there was a genuine fact dispute regarding the waiver issue. On remand, the same Court of Appeals panel summarily concluded, once again, that issues of fact remain regarding waiver. This Court granted leave to appeal on October 30, 2002.

II. Lower Court Proceedings

Plaintiff Quality Products and Concepts Company ("QPAC") filed its Complaint on March 15, 1996, in Wayne County Circuit Court, and the case was assigned to the Honorable Brian K. Zahra. (12-33a). On July 10, 1997, Defendant Nagel Precision, Inc. ("Nagel") moved for summary disposition dismissing QPAC's Complaint. (34-119a). Nagel relied on the

language of the contract. In response, QPAC argued that there was a subsequent oral modification to the contract. (120-192a). Judge Zahra heard arguments on the motion on August 28, 1997, and, at the conclusion of the arguments, said that the parties would be permitted to file supplemental briefs on the issue of whether a subsequent oral agreement can modify a contract that, by its terms, precludes any unwritten modification. On September 30, 1997, the court entered an order granting Nagel's motion. (201-204a). In his order, Judge Zahra stated:

> In the case at bar, there is no evidence that defendant did anything to encourage or authorize plaintiff to seek sales outside of the express territory found in the written contract. Plaintiff unilaterally attempted to modify the written sales agreement by soliciting sales from suppliers outside of the territory expressly defined in the agreement. Plaintiff alleges that defendant encouraged them to continue seeking the Giddings & Lewis and Ex-Cell-O sales, however, plaintiff has presented no evidence to support this allegation. While there is evidence that defendant had knowledge of plaintiff's efforts, there is no evidence that defendant encouraged plaintiff or mutually consented to extend the sales agreement to machine tool suppliers. The mere fact that defendant knew of plaintiff's activities and did not object to them is not enough to constitute a waiver of the written modification requirement. The court finds no question of fact for the jury to decide.

09/30/97 Order, p 4 (204a).

QPAC filed a motion for reconsideration on October 13, 1997, contending that an issue of fact existed about whether Nagel's "silent acquiescence and/or silent encouragement of Plaintiff's procurement of the Giddings & Lewis and Ex-Cell-O business gave rise to an implied contract by operation of fact and/or law." (205-212a). On October 21, 1997, the court entered an order denying QPAC's motion. (213a).

QPAC's appeal followed. (214a).

III. The Court of Appeals Proceedings and Opinion

In its Brief on Appeal, QPAC argued that a question of fact exists as to whether Nagel's silence in response to QPAC's procurement of certain business constituted "an implied contract, a waiver, a modification and/or a subsequent agreement" entitling Plaintiff to commissions. (225-315a). Nagel responded by asserting that QPAC could not unilaterally modify the Agreement. (316-409a).

On March 21, 2000, the Court of Appeals issued its "not for publication," per curiam Opinion signed by Judges Helene N. White, Harold Hood and Kathleen Jansen, reversing the decision of the trial court. (410-418a). The Court of Appeals acknowledged that the Agreement expressly excluded sales to machine tool suppliers, that the sales for which QPAC seeks recovery were to machine tool suppliers, and that there is no evidence in the record that the parties expressly agreed orally or in writing to modify the written agreement. 03/21/00 Order, p 4 (413a). Nevertheless, the Court of Appeals determined that QPAC presented sufficient evidence to survive a motion for summary disposition on the issues of waiver and contract implied in law. *Id.*

Regarding waiver, the Court of Appeals said that a subsequent oral agreement might vary a written contract even though the original contract provides that it can be changed only by written modification. *Id.* The Court of Appeals concluded that QPAC presented sufficient evidence to raise a genuine factual issue whether Nagel's alleged silence in the face of Barton's activity and reporting constituted a waiver. *Id.*, p 5 (414a). The Court of Appeals explicitly rejected Judge Zahra's view that QPAC was required to show that Nagel encouraged or authorized sales outside QPAC's territory. *Id.*

Regarding the implied-in-law contract theory, the Court of Appeals concluded that the evidence is sufficient to raise a triable issue whether QPAC's procurement of business from Giddings & Lewis and Ex-Cell-O benefited Nagel, and whether it is unjust that Nagel retained the benefit without compensating QPAC. *Id.*, p 6 (415a). Although the Court of Appeals recognized that an implied-in-law contract cannot be enforced where an express contract is covering the same subject matter between the parties, the Court of Appeals determined that the Agreement governed the parties' duties with respect to a particular territory and did not purport to address their duties concerning the sales at issue. *Id.*, pp 6-7 (415-416a).

Nagel filed an application for leave to appeal and a motion for peremptory reversal. (419-457a).

IV. The Supreme Court Proceedings and Order

Nagel's application and motion asserted that under Michigan law Nagel's knowledge of QPAC's activities, and failure to object to them, is not enough to constitute a waiver of the written modification requirement. Nagel also argued that the Court of Appeals had erred by reversing and remanding for trial on the implied-in-law contract theory.

On December 15, 2000, the Supreme Court issued an Order. (458a). In lieu of granting leave to appeal, this Court summarily reversed and vacated "that part of the Court of Appeals March 21, 2000, decision which held that a genuine fact issue exists as to whether a contract may be implied in law." Order, p 1 (458a). In addition, this Court remanded the part of the Court of Appeals decision regarding waiver, stating:

> We REMAND this case to the Court of Appeals for reconsideration of the issue whether there exists a genuine fact

> dispute as to whether defendant's alleged silence in the face of plaintiff's activity relative to the excluded machine tool suppliers constituted a waiver in light of the anti-waiver provision in the contract which purports to prevent modification of the written agreement.

Id. Finally, this Court denied the motion for peremptory reversal as moot. *Id.*

V. The Court of Appeals Proceedings and Opinion on Remand

The Court of Appeals did not ask for additional briefing, but on April 24, 2001, instead issued a per curiam, unpublished Opinion signed by Judges White, Hood and Jansen. (459-465a). The Court of Appeals, quoting at length from its earlier Opinion, concluded (once again) that "a reasonable fact finder could conclude that defendant's silence in the face of its knowledge that plaintiff had been calling on two turnkey suppliers and that the turnkey suppliers had placed orders through plaintiff constituted a waiver of the anti-waiver provision in the contract." 04/24/01 Order, p 7 (465a).

Nagel filed an application for leave to appeal and a motion for peremptory reversal. (467-511a).

VI. The Supreme Court Order

The Supreme Court granted leave to appeal on October 30, 2002 and denied the motion for peremptory reversal as moot. (512a) The Court directed the parties to include the following issue among the issues to be briefed:

> [W]hether there exists a genuine fact dispute as to whether defendant's alleged silence in the face of plaintiff's activity relative to the excluded machine tool supplies constituted a waiver in light of the anti-waiver provision in the contract, paragraph 11, which purports to prevent silent modification of the written agreement.

(512a).

VII. Narrative of Pertinent Facts

A. Background

Nagel is a manufacturer of large industrial machinery. The purchasers of Nagel's machines are other large industrial manufacturers, including the Big Three automobile companies. Nagel does not sell its products in quantity. Rather, the market for Nagel's products is well established, and these machines, which cost in the hundreds of thousands of dollars, are manufactured according to the purchaser's exact needs and specifications. QPAC is a manufacturer's representative firm whose principal is Kenneth Barton. Mr. Barton served as a sales representative for Nagel from 1990 through 1995.

B. The Parties' Written Contract

Nagel and QPAC began their relationship in mid-1990. Nagel became interested in securing Mr. Barton's services based upon his representation that he had contacts with customers who purchased "super finishing machines," an area in which Nagel was seeking an increased market share. The parties operated without a formal agreement until 1993.

In early 1993, the parties began exchanging drafts of proposed agreements, and, after extensive negotiations, agreed to the terms of a Sales Representative Agreement (the "Agreement"), which they executed on August 1, 1993. Paragraph 1 appoints QPAC as Nagel's "authorized sales representative for Nagel's products in the Territory listed on Exhibit A." Exhibit A establishes QPAC's territory as "All Engine, Axle, Brake and Drum plants in the state of Michigan" and certain listed customers. Exhibit A expressly excludes from the territory "[a]ll

Transmission plants and other machine tool suppliers (turn key operations)." Defendant's Motion for Summary Disposition, Ex A (47-61a).

The Agreement contains several terms that are relevant to this dispute. It contains an anti-waiver provision (paragraph 11), which states:

> No delay, omission or failure of Nagel to exercise any right or power under this Agreement or to insist upon strict compliance by Representative of any obligation hereunder, and no custom or practice of the parties at variance with the terms and provisions hereof shall constitute a waiver of Nagel's rights to demand exact compliance with the terms hereof; nor shall the same affect or impair the rights of Nagel with respect to any subsequent default of the Representative of the same or different nature.

(55a). The Agreement also contains a written modification requirement (paragraph 13(b)), which states: "This Agreement may not be modified in any way without the written consent of the parties." *Id.* Further, it contains an integration clause (paragraph 13(a)), which states: "This Agreement contains the entire Agreement between the parties relative to the subject matter hereof and supersedes all previous agreements and understandings between the parties." *Id.* Finally, paragraph 5(a) provides that termination of the Agreement by either party "will be effected by the giving of ninety (90) days' prior written notice to the other party of intention to terminate this Agreement, for any reason or for no reason." (51a).

At his deposition, Mr. Barton acknowledged that he negotiated these terms with Nagel and intended to be bound by them. He admitted that he intended the parties' August 1, 1993, Agreement to supersede all previous agreements between the parties and that he was aware of no terms other than those embodied in the Agreement. Defendant's Motion for Summary Disposition, Ex B (62-91a). He further admitted that the negotiations concerning the terms of the Agreement were arms-length and that there was compromise by both sides. *Id.* He also

admitted that QPAC was only entitled to commissions for sales in his territory, and that Exhibit A to the Agreement defined his territory. *Id.* He admitted that Exhibit A to the Agreement excluded from QPAC's territory "machine tool suppliers" that were purchasing Nagel products for end users ("turn key operations"), and he admitted that Giddings & Lewis and Ex-Cell-O were machine tool suppliers. *Id.* Finally, Mr. Barton admitted that he understood that any changes to the terms of the Agreement required the written consent of the parties. *Id.*

C. Termination of QPAC

By June 1994, however, Nagel had developed reservations about the value of Mr. Barton's services. Contrary to the parties' expectations, he had not developed the market for super finishing machines. Nagel also believed that certain of the orders for which it was paying Mr. Barton were generated from sources independent of Mr. Barton, and that he was the beneficiary of these orders simply by virtue of the fact that they fell within his "territory."

Moreover, Mr. Barton began to insist in June 1994 that he be paid for orders placed by machine tool suppliers such as Giddings & Lewis and Ex-Cell-O. In particular, Mr. Barton submitted status reports to Nagel that indicated that Giddings & Lewis and Ex-Cell-O had placed orders or received price quotations. Nagel has submitted evidence that each time the Giddings & Lewis and Ex-Cell-O orders were discussed, Mr. Bochsler told Mr. Barton that he was not entitled to commissions for these orders under the contract. Defendant's Brief in Reply to Plaintiff's Response to Defendant's Motion for Summary Disposition, Ex A (193-200a). QPAC disputes that evidence, contending that Mr. Bochsler did not tell him that Nagel would not pay commissions on those orders until February 1995. Plaintiff's Brief in Support of Its Response to Defendant's Motion for Summary Disposition (120-192a).

In February 1995, because of the doubts that Nagel had developed, the parties began negotiations toward a new definition of Mr. Barton's "territory" that excluded certain plants with which Nagel had developed a relationship independent of Mr. Barton or QPAC. Nagel insisted, however, that the exclusion for machine tool suppliers and "turn key operations" set forth in the 1993 Agreement remain. Mr. Barton wanted to eliminate the exclusion for machine tool suppliers. Defendant's Motion for Summary Disposition, Ex B, pp 137-138 (62-91a). Despite the parties' best efforts to resolve this impasse, they were unable to negotiate a new agreement.

Accordingly, by letter dated March 8, 1995, Nagel gave QPAC a notice of termination pursuant to Paragraph 5(a) of the Agreement. The effective date of termination was June 6, 1995. Defendant's Motion for Summary Disposition, Ex D (95-96a).

ARGUMENT

I. THE COURT SHOULD REVERSE THE COURT OF APPEALS' HOLDING THAT EVIDENCE OF NAGEL'S ALLEGED SILENCE IN THE FACE OF QPAC'S ACTIVITY WITH RESPECT TO THE MACHINE TOOL SUPPLIERS CREATED A GENUINE FACT ISSUE AS TO QPAC'S WAIVER THEORY.

A. The Grant of Summary Disposition is Reviewed *De Novo* on Appeal.

This case involves the trial court's grant of summary disposition under MCR 2.116(C)(10). The grant of summary disposition is a question of law reviewed *de novo* on appeal. *Smith v Global Life Insurance Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

B. Summary of Argument.

This appeal involves the question whether QPAC's claim that Nagel remained silent when confronted with reports from Mr. Barton concerning his efforts to procure business from machine tool suppliers is sufficient to warrant a trial on the issue of whether the parties modified the written agreement.

QPAC claims that throughout late 1994 and early 1995 it submitted status reports to Nagel showing that QPAC was calling on machine tool suppliers and had obtained their business. There is a factual dispute regarding Nagel's response to the reports of QPAC's unilateral efforts to expand its territory. Although Nagel strenuously objects to the notion that it was silent in the face of QPAC's extra-contractual activity, the Court of Appeals — construing the facts in favor of QPAC — assumed that Nagel did not expressly object to QPAC's reports. Based on that assumption, the Court of Appeals determined that Nagel's alleged silence in the face of QPAC's efforts to obtain the machine tool suppliers' orders is sufficient to establish a genuine factual issue regarding a waiver of the written-modification requirement. 03/21/00 Order, p 5 (414a); 04/24/01 Order, p 7 (465a).

Although the Court of Appeals found that "there is no evidence in the record that the parties *expressly* agreed orally or in writing to modify the written agreement," 03/21/00 Order, p 4 (413a), it has not articulated the basis on which it believes that the contract was modified. As discussed below, there is no basis for a trial on the question of whether a modification occurred because there is no evidence that Nagel consented to an expansion of QPAC's territory. Michigan case law establishes that silence cannot, as a matter of law, constitute the consent necessary to form a binding contract.

Moreover, even if evidence that Nagel remained silent in the face of QPAC's extra-contractual activity were sufficient to create a triable issue on the question of whether a modification occurred, such evidence would be legally irrelevant here in light of the written-modification requirement. The Court of Appeals' holding that the requirement was waived is inconsistent with Michigan waiver law and the anti-waiver provision in the Agreement.

C. Because Nagel Did Not Consent To An Expansion Of QPAC's Territory, There Was No Modification As A Matter Of Law.

The Court of Appeals did not expressly consider under what theory Nagel's alleged silence in the face of QPAC's extra-contractual activity plausibly could establish a modification of the written agreement. There is no legal support for the novel proposition that underlies the Court of Appeals' decision: that one party to a contract may unilaterally change the contract terms by notifying the other party that it is instituting a different arrangement. It is well settled that the consent of both parties to a contract is needed to modify that contract. *Kondzer v Wayne County Sheriff*, 219 Mich App 632, 634-35; 558 NW2d 215 (1996) (stating that "a well-settled principle of contract law is that a signed contract, complete on its face, unambiguous in its terms, and intended to be complete integration of agreement cannot be changed without the consent or subsequent agreement of parties") (citing *Westdale Co v Gietzen*, 29 Mich App 564, 568; 185 NW2d 596 (1971)). The party asserting that a subsequent modification occurred must prove that the other party "knowingly, voluntarily, and mutually agreed to new obligations." *Port Huron Educ Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 326-27; 519 NW2d 857 (1996) ("[I]n the same way a meeting of the minds is necessary to create a binding contract, so also is a meeting of the minds necessary to modify the contract after it has been made.").

Indeed, this Court has stated that mere silence may not be construed as indicating the consent necessary to form a contract. *Wilkinson v Lanterman*, 314 Mich 568, 573; 22 NW2d 827 (1946) ("Mere silence may not, under ordinary circumstances at least, be construed as indicating consent, but under circumstances of the character here involved the doing of affirmative acts may properly be regarded as evidencing such consent, and the opposite party to the agreement is entitled to rely thereon.") *See also Stephen Sloan Realty Co v 555 South Woodward Assocs*, 601 F Supp 1008, 1010-1011 (ED Mich, 1985) (commercial real estate purchase contract could not be modified by seller's actions in continuing to negotiate with potential purchaser or by purchaser's unilateral assertion that right of first refusal was still in effect).

The Court of Appeals acknowledged that there was no express oral or written modification. Thus, the Court of Appeals presumably assumed that a modification existed under an implied contract doctrine.[1] An implied-in-fact contract is a contract that is formed through the parties' conduct. *Tustin Elevator & Lumber Co v Ryno*, 373 Mich 322, 330; 129 NW2d 409 (1964) (quoting *Miller v Stevens*, 224 Mich 626, 632; 195 NW 481 (1923)). Unlike written and orally expressed contracts, the parties' intent and mutual assent to an implied-in-fact contract is proven through conduct rather than words. *Id.* "An agreement implied in fact is founded upon a meeting of minds, which although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding." *Baltimore & O.R. Co. v. United States*, 261 U.S. 592, 597 (1923).

[1] A distinction exists between "implied-in-fact" and "implied-in-law" contracts. The Court of Appeals' decision that Plaintiff should be allowed to proceed to trial on an implied-in-law theory was reversed by this Court. Accordingly, we treat the Court of Appeals' analysis of the waiver issue as based on an implied-in-fact theory.

The evidence presented does not support an inference that an implied-in-fact contract modification existed. Accepting the evidence in the light most favorable to the QPAC, it merely shows that QPAC rendered unsolicited, extra-contractual services, and that Nagel failed to object to the payment of commissions for those services. But this Court repeatedly has explained that "[a]n agreement to pay cannot be implied from the mere fact that services were rendered." *See In re Estate of Kaiser*, 357 Mich 103, 110; 97 NW2d 710 (1959) (citing cases); *In re Spenger's Estate*, 341 Mich 491, 494; 67 NW2d 730 (1954); *see also Baltimore & OR Co v United States*, 261 US 592, 597-98 (1923) ("[A]n agreement to pay for services rendered by the plaintiff will not be implied . . . when the defendant neither requested the services nor assented to receiving their benefit under circumstances negativing any presumption that they would be gratuitous . . . .") (citations omitted). An implied-in-fact contract argument would have greater force if Nagel had started paying commissions on sales to machine tool suppliers and then attempted to enforce the parties' written contract, or if Nagel had promised to pay commissions on those sales as an inducement to get QPAC to solicit those sales. Here, where Nagel did nothing to encourage QPAC to call on machine tool suppliers, the evidence of Nagel's consent to modify the contract is wholly insufficient.

D. The Written Modification Requirement Rendered Any Alleged Oral Modification Ineffective As A Matter Of Law.

Not only is QPAC unable to show the mutual consent required to establish a modification of the Agreement, it also cannot show that it complied with the written modification requirement contained in the Agreement. It is firmly established that such clauses are enforceable. *See Cook v Little Caesar Enterprises, Inc*, 972 F Supp 400, 408-09 (ED Mich, 1997) (granting summary

judgment in favor of defendant because oral modification alleged by plaintiff was ineffective as a matter of law in light of contract provision stating that any modification must be in writing and signed by both parties), *aff'd*, 210 F3d 653 (CA6, 2000); *see also Lincoln Elec Co v St Paul Fire & Marine Ins Co*, 210 F3d 672, 687 (CA6, 2000) (a "written changes only" provision preempts consideration of evidence regarding the parties' course of performance); *Tenniswood v Saturn Electronics & Engineering Co*, 1999 Mich App LEXIS 2829, *3 (1999) (noting that oral agreement was unenforceable under provision precluding oral modifications). Because QPAC admits that there was no written modification to the Agreement, any evidence of an oral modification is legally irrelevant.

The Court of Appeals held that Nagel waived the written modification requirement by allegedly remaining silent in the face of QPAC's extra-contractual efforts. That holding, however, is not consistent with Michigan law regarding waiver and ignores the broad language of the particular contractual provision that the parties used in this case.

1. Michigan Waiver Law

As defined by this Court, "'waiver' connotes an intentional abandonment of a known right." *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 65; 624 NW2d 663 (2002) (citing *People v Carines*, 460 Mich. 750, 762, n 7; 597 N.W.2d 130 (1999)); *see also Book Furniture Co v Chance*, 352 Mich 521, 526; 90 NW2d 651 (1958). "'To constitute a waiver, there must be an existing right, benefit, or advantage, knowledge, actual or constructive, of the existence of such right, benefit, or advantage, and an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment.'" *HJ Tucker & Assocs, Inc v Allied Chucker & Eng'g*

Co, 234 Mich App 550, 564; 595 NW2d 176 (1999) (quoting *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718-19; 179 NW2d 252 (1970)). "'A waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance.'" *Id.*

This Court recently reaffirmed the well-established principle that mere silence is not sufficient to establish a waiver. *Roberts*, 466 Mich at 67-68. In *Roberts*, a medical malpractice action, this Court held that the trial court properly had entered summary disposition in favor of defendants based on a statute of limitations defense. *Id.* The plaintiff had argued that the statute of limitations was tolled based upon its submission of a notice of intent to sue in accordance with Michigan law. That argument was rejected by this Court, based upon the deficiencies in the notice of intent ***and*** its determination that the defendants had not waived their right to challenge the sufficiency of the notice of intent by failing to raise their objections before the filing of the complaint. *Id.* In so holding, the Court expressly rejected the dissent's so-called "'nonrepresentation implied waiver' theory," which, according to the majority, was based "on the absence of representations to establish a waiver." *Id.* at 68. *See also Roberts*, 468 Mich at 72 (Kelly, J., dissenting) (rejecting majority's characterization of dissenting position, stating "I would not, and do not, infer waiver from mere silence."). Likewise, the Court of Appeals has recognized that waiver may not be established by mere silence. *Moore v First Security Casualty Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997) (affirming grant of summary disposition in favor of insurer; insurer did not waive its right to approve settlement by failing to timely respond to insured's letter).

Here, Nagel did nothing that would suggest that it intended to relinquish its right to rely on the written modification requirement. Indeed, the trial court found that there was no evidence in the record that Nagel encouraged QPAC to solicit machine tool suppliers. All that remains to support a waiver is Nagel's alleged silence in the face of QPAC's activities. As we have explained above, it is already a departure from this Court's doctrine to find a party bound to a modification of a contract purely by silence. It is a flagrant violation of that doctrine to find such a modification where silence must serve not only as the basis for the party's alleged agreement in fact to the modification, but also as the basis for waiver of a written-modification requirement. The Court of Appeals decision should be reversed.

2. Anti-Waiver Provision

The force of that conclusion is bolstered considerably by the language that the parties used in the Agreement. Specifically the contract does not stop at imposing a written modification requirement. Instead, Paragraph 11 of the Agreement, the anti-waiver clause, goes on to provide:

> ***No delay, omission or failure of Nagel to exercise any right or power under this Agreement*** or to insist upon strict compliance by Representative of any obligation hereunder, and no custom or practice of the parties at variance with the terms and provisions hereof shall constitute a waiver of Nagel's rights to demand exact compliance with the terms hereof; nor shall the same affect or impair the rights of Nagel with respect to any subsequent default of the Representative of the same or different nature.

(55a) (emphasis added). Thus, according to the plain language of the Agreement, no inaction by Nagel in enforcing any right or power under the Agreement can, as a matter of law, be deemed to constitute a waiver of Nagel's right to demand exact compliance. Surely, even if this Court were

inclined to depart from its prior holdings to countenance silence as enough to constitute a waiver in some unusual circumstances, it would not be appropriate to do so in a case where the parties specifically agreed that silence would be inadequate. In a jurisdiction that affords considerable respect to the language of negotiated contracts between commercial businesses, it is almost farcical to imagine that a court could deem Nagel's silence enough not only to bind it to a contract, but also enough to waive a written-modification requirement, and even enough to waive a specific contractual provision indicating that silence should not be construed as a waiver or modification of the contract.

To be sure, this Court has not previously had an occasion to consider the enforceability of contractual anti-waiver provisions. The Court of Appeals has addressed the issue in the limited context of defaults on credit notes held by financial institutions. *See Formall, Inc v Community National Bank*, 138 Mich App 588; 360 NW2d 902 (1984). *Formall* involved an anti-waiver provision in a promissory note. After the note matured, the lender did not immediately declare a default. Instead, the parties entered negotiations to refinance the loan. During that time, no principal payments were made, but the lender did accept several interest payments. The negotiations ultimately were unsuccessful, so the lender declared a default and exercised setoff remedies pursuant to the note. The borrower sued for breach of contract, claiming that the lender had waived its right to enforce the default provisions of the note. The trial court granted the lender's motion for partial summary disposition, holding that the anti-waiver provision precluded consideration of any evidence that the lender waived the default provisions. The Court of Appeals reversed, concluding that an anti-waiver provision may be waived by a course of

performance, such as the acceptance of interest payments. 138 Mich App at 602-03. In so holding, the Court noted as follows:

> [W]e confine our decision to the facts of this case alone. ***We decline to make a jury question out of every situation where a lender had accepted*** **any** ***payments, even though small, or temporarily deferred acceleration, or otherwise forbore or desisted from a strict compliance with the rights of collection. There reasonably must be a threshold below which the "anti-waiver" clause is protection for the bank.*** Just what that threshold level should be remains to be decided on a case by case basis. Suffice it to say, given the facts of the instant case, the threshold level has been exceeded. Because the transcript contains testimony and facts from which a close question is presented as to whether the plaintiffs had reason to believe the bank would not so abruptly accelerate all three notes according to the strict terms thereof, we believe the trial court erred in granting summary judgment to defendant.

138 Mich App at 603 (emphasis added).

Whatever the wisdom of that decision to ignore the language of the contract at issue in that case, *compare MCA Television, Ltd v Public Interest Corp*, 171 F3d 1265, 1271 (CA11, 1999) (enforcing anti-waiver provision in licensing contract), the *Formall* analysis strongly suggests the impropriety of the decision below, where there was no course of performance indicating an acquiescence in QPAC's modification. Perhaps a modification could be inferred if the parties had made a series of payments predicated on the modification, but at that point, of course, the waiver would come from a course of performance, not from silence. For that reason, Nagel's silence in the face of the services rendered by QPAC cannot plausibly construed to amount to a consent to a modification of the written-modification requirement of the contract: Nagel's specific refusal to pay for those services shows that there was no affirmative conduct that would justify a finding of a waiver or modification of the contract.

In any event, there is good reason to believe that the holding of the *Formall* case would not be extended beyond the unique context of credit notes. *See De Valk Lincoln Mercury, Inc v Ford*, 811 F2d 326, 334 (CA7, 1987) (rejecting contention that Ford's release provision in standard contract with dealers could be waived by subsequent negotiations between parties in light of anti-waiver provision in contract, based upon belief that "Michigan's courts would uphold such an 'anti-waiver' clause" outside of credit note context).

3. Cases Involving Waiver of Written Modification Requirement

Even if the anti-waiver provision itself is susceptible to waiver, as the Court of Appeals' analysis assumes, the cases cited by the Court of Appeals with respect to the waiver of written modification requirements do not support its holding. The Court of Appeals quotes lengthy passages in *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334; 168 NW 425 (1918). For example, the Court of Appeals at page 4 of its initial opinion quotes a statement from *Klas* indicating that a waiver "may be shown by a course of acts and conduct, and in some cases will be implied therefrom. It may also be shown by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive," 202 Mich 334, 339-40 (quoting 40 Cyc. p. 267). (413a). The Court of Appeals interpreted that language to mean that inaction standing alone is sufficient to prove waiver. As Nagel has previously emphasized to this Court, however, that reading of the case completely ignores the facts that were the basis of the *Klas* Court's holding. *Klas* does ***not*** stand for the proposition that a party to a written agreement can unilaterally modify the agreement by informing the other party that it is performing additional work. To the

contrary, *Klas* held only that a defendant's ordering or agreeing to a modification is adequate to establish a waiver of a written-modification requirement.[2]

Klas involved a claim for extra work under a construction contract. Although the parties' written contract stated that permission for extras should be in writing, the defendant orally ordered the plaintiff to perform extra work. Significantly, the testimony showed that when the plaintiff mentioned the contractual requirement to the defendant, the defendant said that "there was no necessity of going back to the contract on that point, that they were not children, they were willing to pay for any work they would order, and that they had had thousands of dollars worth of work done for them and were willing to pay for anything they ordered." 202 Mich at 336. Based on this evidence, the Supreme Court reversed the trial judge's order directing a verdict for the defendant, and summarized the law of waiver as follows:

> "A provision in the contract that all extra work shall be ordered by the architect in writing may be waived by the parties, the question whether there has been such a waiver usually being one of fact, depending on the facts and the circumstances of the particular case. Thus such waiver may be implied ***where the order and the extra work are known to the owner***, and not objected to by him, where the charge for extra work is agreed to by the owner, or where the extra work is orally ordered by the owner or called for by the agent in the plans and specifications; or the owner by his conduct may be estopped from setting up such provision as a defense." 9 Corpus Juris, p. 846.

202 Mich 339-40 (emphasis added). In context, the reference to an order is a reference to an order by the architect that is the agent of the owner. Thus, the most that can be read into *Klas* is

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[2] Any views the *Klas* Court might have expressed regarding the analysis of a situation that was not before it could not rise to the level of a holding binding on subsequent courts. *See People v Borchard-Ruhland*, 460 Mich 278, 286; 597 NW2d 1 (1999) (statements regarding a rule of law that are not essential to the decision of a case do not create a binding rule of law); *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-98; 374 NW2d 905 (1985) (same).

the possibility that a principal can be bound to a waiver of a written-modification requirement by an affirmative act of the principal's agent.[3] Here, in contrast to *Klas*, there is no evidence that Nagel even encouraged, much less ordered, QPAC to obtain the orders at issue. Moreover, there is not even a suggestion of an allegation by QPAC that Nagel remained silent in the face of an assertion by QPAC related to the written-modification requirement. In the absence of any conduct by QPAC calling Nagel's attention to that provision – or even to QPAC's willingness to depart from that provision – it is difficult to see how Nagel's silence possibly could be construed as a waiver of that provision.

That understanding of *Klas* is bolstered by this Court's decision in *Banwell v Risdon*, 258 Mich 274, 278-79; 241 NW 796 (1932). *Banwell* involved a written contract for the construction of a garage. The contract stipulated that all changes must be in writing. The plaintiff sued to enforce a mechanic's lien for labor and materials furnished in completing the garage, and claimed charges for extras that defendants had ordered both verbally and in writing. Relying on the written-modification requirement, defendants questioned the verbal changes. This Court recognized that the requirement did not prevent the parties from orally modifying their

[3] The Court of Appeals also cites *Minkus v Sarge*, 348 Mich 415; 83 NW2d 310 (1957); *Cascade Electric Co v Rice*, 70 Mich App 420; 245 NW2d 774 (1976) and Annotation, *Effect of Stipulation, in Private Building or Construction Contract, That Alterations or Extras must Be Ordered in Writing*, 2 ALR3d 620, §§21 and 22, at 658-69, for this proposition. (459-465a). Those authorities actually support Nagel's position. In *Minkus*, 348 Mich at 421-22, this Court held that a written modification requirement was waived where the defendant's conduct indicated an affirmative request for and consent to the contractual changes. In *Cascade Electric Co*, 70 Mich App at 424-26, the Court of Appeals found no error in the trial court's submission of the case to the jury on a waiver theory where the record was replete with testimony that the defendant directed that contractual changes be made. Finally, the cases cited in the ALR annotation indicate that the overwhelming majority of jurisdictions require some evidence stronger than a mere failure to object, and in most cases a showing that the defendant affirmatively ordered, requested, authorized or consented to the work. *See* Annotation, *supra*, at 661-69.

agreement. Explaining its conclusion, the Court stated that a written modification requirement "places upon plaintiff the burden of establishing by convincing evidence that changes charged for and not authorized in writing were in fact authorized by verbal agreement, inclusive of full understanding of call for payment thereof." 258 Mich at 278-79. Thus, under *Banwell*, QPAC had the burden of establishing by "convincing evidence" that the alleged oral modification was "in fact authorized by verbal agreement, inclusive of full understanding of call for payment thereof." Again, QPAC has not alleged that there was any modification authorized by verbal agreement, nor that there was any discussion at all of the provisions indicating that silence would not be treated as a waiver.

Finally, neither the court below nor either of the parties has located any Michigan case that has rejected *Banwell* and held that a defendant's failure to object to activities of a plaintiff is enough to waive a written modification requirement. Until this case, every Michigan case that has found a waiver of a written-modification requirement has, as *Banwell* requires, involved an express order by the defendant. *See, e.g., Morley Bros v FR Patterson Constr Co*, 266 Mich 52, 56-58; 253 NW 213 (1934) (holding that plaintiff was entitled to compensation for "extras" furnished at the direction and request of defendant's representatives, even though the parties' written contract stipulated that it could not be changed but by agreement in writing); *Jarosz v Caesar Realty, Inc*, 53 Mich App 402, 405; 220 NW2d 191 (1974) (holding that an agreement for compensation for extra work could be implied, despite the existence of a no written-modification requirement, where the defendant knew about and verbally ordered the changes).

The Court of Appeals did not even purport to reconcile its decision with *Banwell* and its progeny. On the contrary, notwithstanding *Banwell's* apparently dispositive analysis of the

crucial legal question in this case, the Court of Appeals completely ignored that case – both before and after this Court's summary reversal of the Court of Appeals' first opinion.

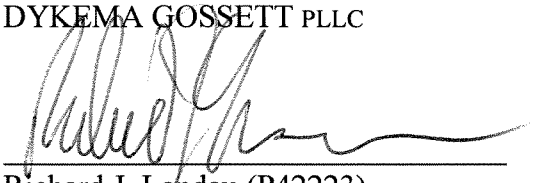
In sum, unlike the defendants in the cases above, QPAC does not contend that Nagel expressly requested or even agreed to a modification of the Agreement. Instead, it was QPAC that attempted to alter the contractual relationship. QPAC's actions cannot form the basis of a claim of waiver by Nagel. This is precisely the type of situation that the written modification requirement is designed to address: one party relying on vague allegations that a modification occurred through some indefinite unilateral action on its part that does not include any written memorialization of a contractual change by the other party. See *Cloverdale Equipment Co v Simon Aerials, Inc*, 869 F2d 934, 939 (CA6, 1989). ("Michigan assigns the burden of proof of subsequent oral modification to the alleging party, and in light of a written modification-only provision, vague assertions of an oral modification fail to raise a genuine factual issue sufficient to defeat a summary judgment motion.") That is particularly true here, where the anti-waiver clause specifically considered and rejected the possibility that the parties might wish to retain the flexibility to modify their agreement by inaction.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Appellant Nagel Precision, Inc. respectfully requests that the Supreme Court reverse the Court of Appeals April 24, 2001, Opinion.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: 

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